Supreme Court, U.S.
FILED

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No. ____

In The
Supreme Court of the United States
October Term, 1996

PRESTONWOOD GOLF CLUB CORP.,
Petitioner,

v.

ALAN NIEDERLITZ, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 11, 1997

50 pp

QUESTIONS PRESENTED

Section 1681q of the Fair Credit Reporting Act provides that any person "knowingly and willfully" obtaining consumer information from a consumer reporting agency "under false pretenses" is subject to a fine up to $5,000 and/or imprisonment up to one year. Section 1681n of the Fair Credit Reporting Act provides that a user of consumer information who "willfully" fails to comply with any requirement of the Fair Credit Reporting Act may be held civilly liable. Petitioner was accused by Respondents of violating Section 1681q by obtaining credit reports on Respondents. While admitting to obtaining the credit reports, Petitioner contended that it was permitted to do so because its records revealed the existence of a debt by Respondents. Subsequently, Petitioner determined that its records were in error and that Respondents might not owe a debt. The questions presented are as follows:

1. Whether a person can be held civilly liable for an alleged violation of a criminal statute (specifically, Section 1681q) based on a lesser degree of culpability than that provided in the criminal statute.

2. Whether the requirements and limitations upon users of consumer information exceed those specifically identified in the Fair Credit Reporting Act.

LIST OF PARTIES IN THE COURTS BELOW

Respondents (Plaintiffs-Appellees below):

Alan Niederlitz
Peggy Niederlitz

Petitioner (Defendant-Appellant below):

Prestonwood Golf Club Corp.
doing business as Prestonwood Country Club
(No parent or subsidiary companies)

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PRESTONWOOD GOLF CLUB CORP.,
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On Writ of Certiorari to the
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for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Prestonwood Golf Club Corp. ("Prestonwood") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit as shown by its opinion dated October 11, 1996, which affirmed a judgment of the United States District Court for the Northern District of Texas, Dallas Division.

OPINIONS BELOW

The October 11, 1996, opinion of the Court of Appeals, whose decision is sought to be reviewed in No. 96-10079, was not reported and is reproduced at Appendix

pp. 1a. The prior judgment of the United States District Court for the Northern District of Texas, entered on December 8, 1995, in Case No. 3:94-CV-2395 is also not reported and is reproduced at Appendix pp. 18a.

JURISDICTION

The opinion of the Court of Appeals (1a) was entered on October 11, 1996. A timely motion for rehearing was denied on November 13, 1996 (20a). Jurisdiction in the Court of Appeals was based on 28 U.S.C. § 636(c)(3) and 28 U.S.C. § 1291.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Fair Credit Reporting Act, Section 1681b (15 U.S.C. § 1681b):

> **Permissible purposes of consumer reports**
>
> A consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> **(1)** In response to the order of a court having jurisdiction to issue such an order.
>
> **(2)** In accordance with the written instructions of the consumer to whom it relates.
>
> **(3)** To a person which it has reason to believe --
>
> > **(A)** intends to use the information in connection with a credit transaction involving the consumer on whom the

information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

Fair Credit Reporting Act, Section 1681n (15 U.S.C. § 1681n):

Civil liability for willful noncompliance

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of --

(1) any actual damages sustained by the consumer as a result of the failure;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Fair Credit Reporting Act, Section 1681q (15 U.S.C. § 1681q):

Obtaining information under false pretenses

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined not more than $5,000 or imprisoned not more than one year, or both.

STATEMENT OF THE CASE

A. Background Facts

Alan Niederlitz was a golf professional employed at Prestonwood Country Club periodically during the years 1988 through 1990. In connection with his employment, he was allowed to charge various purchases on credit through the golf shop. He was also granted honorary membership status at the country club, allowing him to charge other personal purchases. Peggy Niederlitz, the wife of Alan Niederlitz, was granted an honorary membership, allowing her to charge her personal purchases on the account of Alan Niederlitz.

Vance Miller, Jr., one of the directors of Prestonwood, inquired of Cotton Dunn, Prestonwood's

director of golf operations, as to whether the Niederlitzes owed any money on their account. Mr. Dunn checked his records, which indicated that the Niederlitzes continued to owe $917.12 on their account. Mr. Miller provided information on the Niederlitzes to Kenna Reynolds, one of Prestonwood's membership secretaries. Mrs. Reynolds used that information to obtain a credit report on the Niederlitzes on November 2, 1993, which she turned over to Mr. Miller.

On November 30, 1993, Mr. Niederlitz obtained a credit disclosure report on himself from TRW, a credit reporting agency. That disclosure report revealed that Prestonwood had requested a credit report on Mr. Niederlitz for the purpose of "Inquiry made for credit extension, review or collection for unspecified repayment terms. The amount is unspecified." Mr. Niederlitz made no inquiry of Prestonwood regarding the obtaining of the credit report. Mrs. Niederlitz did not know that her credit had been checked by Prestonwood until September of 1995.

In 1994, the Niederlitzes were involved in a separate lawsuit with Mr. Miller, involving allegations of personal injury. Mr. Miller subsequently provided a copy of the credit report to Timothy Ricky Frazier, his attorney in the separate personal injury lawsuit. Mr. Frazier did not request that Mr. Miller obtain the report or provide the report to him. Mr. Frazier testified that he did not know when he received the credit report from Mr. Miller. The Niederlitzes believe that Mr. Frazier used information obtained from the credit report in connection with the separate lawsuit between the Niederlitzes and Mr. Miller.

This belief is based on a deposition taken of Mrs. Niederlitz at which the credit report was not produced to Mrs. Niederlitz and at which Mrs. Niederlitz was not asked any questions about the credit report. The Niederlitzes believe that questions regarding bankruptcy asked at the deposition must have been based on information from the credit report. The Niederlitzes had filed a personal bankruptcy, which was subsequently dismissed. The filing of the bankruptcy was public record. Mr. Frazier testified that he made no use of the Niederlitzes' credit report in connection with the separate personal injury lawsuit. Mr. Frazier also testified that he asked no deposition questions of Mrs. Niederlitz regarding a personal bankruptcy, but did inquire whether a company that Mrs. Niederlitz indicated had gone out of business had filed bankruptcy.

Subsequent to the filing of this lawsuit by the Niederlitzes, Mr. Dunn, Prestonwood's golf director, determined that his records were in error with regard to the amount believed to be owed by the Niederlitzes. Mr. Dunn determined that he had failed to credit the Niederlitzes' account for a payment of $699.32. However, in crediting the $699.32, Mr. Dunn's records still indicated an outstanding unpaid balance of $217.80 on the Niederlitzes' account at Prestonwood. Mr. Niederlitz believes that he may have paid the remaining balance with two subsequent checks in the amounts of $212.80 and $156.00. However, Mr. Dunn believes that those checks were actually for some other debt other than the account charges.

B. Jurisdiction in the District Court

On November 10, 1994, the Niederlitzes filed this lawsuit against Prestonwood, alleging violation of the Fair Credit Reporting Act and specifically Section 1681q of the Act based on the obtaining of the credit reports. Jurisdiction in the United States District Court, the court of first instance, was based on 15 U.S.C. § 1681p and 28 U.S.C. § 1331.

C. Jury Instructions on Applicable Law

The lawsuit was tried to a jury. In its instructions to the jury, the District Court provided the following definition of "under false pretenses":

> The term "under false pretenses" means that the reasons given to the consumer reporting agency - in this case TRW - by the agents and employees of Defendant were untrue or that the true reason for seeking consumer information was not for a purpose permitted under the Act.

The District Court also provided the following definition of "willfully":

> The term "willfully" means an act or failure to do any act done voluntarily and intentionally, and with specific intent to fail to do something which the law requires to be done; that is to say, with a purpose to disobey or disregard the law.

The District Court also provided the following instruction to the jury regarding the requirements of the Fair Credit Reporting Act:

> Under the Fair Credit Reporting Act, a user of consumer reporting information must follow reasonable procedures to assure that both the reasons for obtaining such information and uses made of such information comply with the authorized purposes of the Act. The law is directed at the actual procedure, method or steps followed by a corporation, its employees or agents in obtaining and using consumer reporting information.

Prestonwood properly and timely objected to the definitions and instructions.

Prestonwood's objection to the trial court's definition of "false pretenses" was based on the second alternative definition provided; i.e., "that the true reason for seeking consumer information was not for a purpose permitted under the Act."

Prestonwood's objection to the court's definition of "willfully" was based on the failure of the court to include an instruction that action taken by mistake, accident or in a good-faith belief that the action was permitted under the law would not be willful.

Prestonwood's objection to the court's instruction regarding procedures and uses of consumer information was that no procedure requirement or use restriction exists in the Fair Credit Reporting Act regarding users of consumer information.

The District Court overruled all of Prestonwood's objections and requests for corrected instructions.

Based upon the definitions, instructions and issues presented to the jury, the jury returned a verdict in favor

of the Niederlitzes.

D. Opinion of the Court of Appeals

Prestonwood brought forward on appeal to the United States Court of Appeals for the Fifth Circuit each of its issues relating to the improper definitions and instructions presented to the jury by the District Court. Though the issues related to a statute (15 U.S.C. § 1681q) and issues of law which had never been reviewed or addressed by the Court of Appeals, the Court of Appeals chose to affirm the judgment of District Court without addressing any of the substantive issues presented. In effect, even though hearing oral argument in the appeal, the Court of Appeals issued a summary disposition of the matter.

The Court of Appeals stated: "We are not persuaded that the charge as a whole created substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations."

REASONS FOR ALLOWING THE WRIT

Because of the manner in which the Court of Appeals disposed of Prestonwood's appeal from the judgment of the District Court, it becomes difficult to determine precisely the opinion of the Court of Appeals. After granting and hearing oral argument, the Court of Appeals issued its opinion affirming the judgment of the District Court and merely stated: "We are not persuaded that the charge as a whole created substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." See opinion at Appendix 1a.

The "substantial and ineradicable doubt" standard is one created and used primarily by the Fifth Circuit. To a lesser degree it is used by the Eleventh Circuit. *See Johnson v. Bryant*, 671 F.2d 1276, 1280 (11th Cir. 1982) (quoting *Miller v. Universal Studios, Inc.*, 650 F.2d 1365, 1372 (5th Cir. July 1981)). The Eleventh Circuit, of course, was created by a split of the Fifth Circuit in October of 1981.

A review of reported cases in which the Fifth Circuit has applied the "substantial and ineradicable doubt" standard reveals that the Fifth Circuit has never affirmed a judgment where the jury instructions included incorrect statements and implications of law when such law formed the basis of both the plaintiff's claim and the jury's verdict and where the instructions failed to include requested defensive instructions. *See, e.g., Flores v. Cameron County, Tex.*, 92 F.3d 258 (5th Cir. 1996); *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187 (5th Cir. 1995); *E.E.O.C. v. Manville Sales Corp.*, 27 F.3d 1089 (5th Cir. 1994).

Similarly, in applying such standard, the Fifth Circuit has never reversed a judgment where it found the jury instructions to be correct and complete. *See, e.g., Woodhouse v. Magnolia Hospital*, 92 F.3d 248 (5th Cir. 1996); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Cagle*, 68 F.3d 905 (5th Cir. 1995); *Hiltgen v. Sumrall*, 47 F.3d 695 (5th Cir. 1995).

The opinion by the Fifth Circuit in the appeal of this case amounts to little more than a summary disposition of the appeal without any review or discussion of applicable law. Based on the manner in which the

Fifth Circuit has applied the "substantial and ineradicable doubt" standard in its reported opinions, Prestonwood assumes that the Court of Appeals found no error in the definitions and instructions given to the jury and refused by the District Court to be presented to the jury.

In the event that there is any question regarding the actual determination of the Fifth Circuit, Prestonwood submits that this case may be appropriate for grant, vacate and remand so that the Fifth Circuit can properly articulate its view of the applicable law. *See Lawrence v. Chater*, 116 S.Ct. 604, 608 (1996).

> [I]t is important that the meaningful exercise of this Court's appellate powers not be precluded by uncertainty as to what the court below "*might* ... have relied on." ... [A]mbiguous summary dispositions below tend, by their very nature, to lack the precedential significance that we generally look for in deciding whether to exercise our discretion to grant plenary review.

Id.

Federal Statutory Issue of First Impression

This Court has never reviewed or addressed any issue relating to the Fair Credit Reporting Act ("FCRA"). Thus far, it has been left up to the district courts with some small guidance from the courts of appeal to interpret the provisions of the FCRA. Such interpretation has not been consistent and leaves open the possibility that a user of consumer information, who has a valid reason for seeking such information, may be held liable for violating the FCRA when in fact no such violation has

occurred. Such is the case here where Prestonwood was held in violation of the FCRA for allegedly seeking information on the Niederlitzes for a purpose not allowed under the Act, even though a permissible and disclosed purpose for obtaining information in fact existed.

The FCRA touches upon and regulates a matter of life and business that pervades the American culture -- the credit industry. Information on virtually every American consumer is contained within the files of credit reporting agencies. And such information is utilized to one degree or another by virtually every American business.

To reassure the conduct of American commerce, and to potentially avert a plethora of lawsuits based on a contorted view of the FCRA, consumers need to understand the permissible purposes for which their credit information may be reviewed and businesses need to understand the permissible purposes for which they may review a consumer's information, including whether those permissible purposes are truly "permissible." By granting writ in this case, the Court can clarify the purpose and intent of the FCRA for both consumers and businesses while also upholding the standard of culpability expressed by this Court regarding other federal statutes.

In this case, Prestonwood was accused of violating a criminal statute, Section 1681q of the FCRA. That statute provides that an action must be taken "knowingly and willfully" to be considered a violation. However, Prestonwood was sued for the alleged violation of the criminal statute under a statute providing a civil remedy, Section 1681n of the FCRA. The civil-penalty statute only requires that an action be taken *willfully*. There is no

requirement of *knowingly* in Section 1681n.

However, it is Prestonwood's contention that if it is to be held in violation of the criminal statute, even if purely in a civil context, then its actions must be shown to be not only *willful* but *knowing*. As this Court noted in *Ex parte Public Nat'l Bank of New York*, 278 U.S. 101, 104 (1928):

> No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance and effect shall, if possible, be accorded to every word.

Prestonwood's requested definition[1] of "willfully" includes the required knowledge instruction by defining "willfully" as engaging in conduct "when the defendant knows or shows reckless disregard for whether the conduct violates the Fair Credit Reporting Act." The Court of Appeals' affirmance of the trial court's rejection of that instruction and the trial court's refusal to give instruction to the jury regarding the term "knowingly" violates this Court's cardinal rule by ignoring the precise wording of Section 1681q.

In effect, the trial court and the Court of Appeals

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[1]Prestonwood's requested definition was as follows:

> "Willfully" means to engage in conduct when the defendant knows or shows reckless disregard for whether the conduct violates the Fair Credit Reporting Act. But a willful violation does not necessarily occur just because the defendant knew the Fair Credit Reporting Act might apply. When a defendant believes in good faith that its action is permissible under the Fair Credit Reporting Act, its conduct is not willful.

modified the criminal culpability requirement of Section 1681q in favor of a less restrictive civil culpability requirement. Under such a modified standard, a person, such as Prestonwood, can be held civilly liable for violation of a criminal statute when he could not be held criminally liable under the same statute.

While this Court has addressed the issue of when a civil cause of action exists under a criminal statute, *see Cort v. Ash*, 422 U.S. 66, 78 (1975), it has failed to address the issue of whether a plaintiff in a civil action bears the same burden as a prosecutor in proving the culpability of a defendant. Prestonwood contends that the burden must be the same, because the statute upon which a plaintiff bases his claim and upon which a prosecutor seeks conviction is the same and does not change depending upon who seeks to enforce the provisions of the statute.

Conflict with Supreme Court Decisions

While this Court has never reviewed the FCRA, issues presented in this appeal have been repeatedly reviewed and determined by the Court.

One of the primary issues presented to the Court of Appeals was the proper definition of "willfully" as provided in the FCRA. Prestonwood was accused of violating Section 1681q, a criminal statute providing that a person who *knowingly and willfully* obtains consumer information under false pretenses is in violation of such statute. Various lower courts have determined that a violation of Section 1681q gives rise to a civil cause of action under Section 1681n, which provides for civil liability for *willfully* failing to comply with any requirement

of the FCRA. *See, e.g., Yohay v. City of Alexandria Employees Credit Union*, 827 F.2d 967 (4th Cir. 1987); *Kennedy v. Border City Sav. & Loan Ass'n*, 747 F.2d 367 (6th Cir. 1984); *Hansen v. Morgan*, 582 F.2d 1214 (9th Cir. 1978).

While the trial court provided a basic definition for the term "willfully," it failed to provide the defensive instructions requested by Prestonwood. The trial court's instruction stated that "willfully" means "voluntarily and intentionally" and "with a purpose to disobey or disregard the law." However, the trial court refused to give any defensive instruction regarding knowledge, accident, mistake or good faith.

The definition requested by Prestonwood was virtually verbatim from the definition of "willfully" provided by the Fifth Circuit in *Purcell v. Sequin State Bank & Trust Co.*, 999 F.2d 950, 955 (5th Cir. 1993). That definition provides that "[w]hen a defendant believes in good faith that its action is permissible ..., its conduct is not willful." The *Purcell* case involved the Age Discrimination in Employment Act ("ADEA"), rather than the FCRA. However, the context of the statutes is similar, a civil remedy for violation of a federal statute.

The Fifth Circuit's *Purcell* definition of "willfully" is based on this Court's own explanation of the ADEA's use of the term "willfully." In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 129 (1985), this Court reversed a determination of willful violation under the ADEA because the defendant "acted reasonably and in good faith" in attempting to comply with the law.

While this Court has never provided a single, all-

encompassing definition for the term "willfully" as used in the various federal statutes, it has repeatedly stated that a person acting in good faith, in error, or without knowledge does not act *willfully*.

> In common usage the word "willful" is considered synonymous with such words as "voluntary," "deliberate," and "intentional." See Roget's International Thesaurus § 622.7, p. 479; § 653.9, p. 501 (4th ed. 1977). The word "willful" is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent."

McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988) (reviewing Fair Labor Standards Act of 1938).

In *United States v. Murdock*, 290 U.S. 389 (1933), this Court, in reviewing criminal provisions of the Revenue Act of 1926 and the Revenue Act of 1928, discussed the meaning of the term "willfully."

> The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose [citations omitted]; without justifiable excuse [citations omitted]; stubbornly, obstinately, perversely [citations omitted]. The word is also employed to characterize a thing done without ground for believing it is lawful [citations omitted], or conduct marked by careless disregard whether or not one has the right so to act [citations omitted].

Id. at 394-95. *See also Ratzlaf v. United States*, 114 S.Ct. 655, 663 (1994) (reversing conviction under statute prohibiting "structuring" of transactions to avoid bank reporting requirements due to failure to instruct jury that "willful" meant defendant must know conduct was unlawful); *Cheek v. United States*, 111 S.Ct. 604, 611 (1991) (reversing conviction for tax evasion and failure to file income tax return because an act is not willful "if the jury credits a good-faith misunderstanding and belief submission"); *Screws v. United States*, 325 U.S. 91, 104 (1945) (plurality opinion) (reversing for failure to properly instruct jury concerning "willfully" in context of civil rights law); *Spies v. United States*, 317 U.S. 492, 496 (1943) ("It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care."; reviewing Revenue Act of 1936 and Internal Revenue Code).

As this Court stated in *Screws*, the law should not "become a trap for [those] acting in good faith." 325 U.S. at 104. The dissent[2] was even more emphatic in its view of the "willfulness" requirement as an element of a criminal statute.

> When a criminal statute prohibits something from being "willfully" done, "willfully" never defines the physical conduct or the result the bringing of which to pass is proscribed. "Willfully" merely adds a

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[2]In Screws, a plurality of the Court (four justices) voted to reverse for a new trial. One justice voted to affirm. Three justices dissented from the plurality because they believed the judgment should be reversed and rendered. It is the dissent of the three justices which is referred to here.

> certain state of mind as a prerequisite to criminal responsibility for the otherwise proscribed act.

325 U.S. at 154 (dissenting opinion). "[T]here must be a *mens rea* for every offense. In other words, a guilty state of mind is usually required before one can be punished for an outlawed act." *Id.* at 156.

In this case, Prestonwood admitted that it requested and received consumer reports on the Niederlitzes from a credit reporting agency. However, the evidence at trial showed that records were reviewed and a debt was determined to exist prior to making such request. Prestonwood admitted that its records turned out to be in error, at least as to the amount of the Niederlitzes' debt. Though accounting records continue to show the existence of a debt, it remains unclear from the record as to whether any debt continues to exist.

However, Prestonwood contends that the existence or lack of any debt is irrelevant to a determination of liability under Section 1681q. The relevant issue is whether Prestonwood had a good-faith belief, whether correct or in error, that such a debt existed to permit the request of a credit report on the Niederlitzes. The evidence at trial established such a good-faith belief, and this Court has determined that such a belief is a defense to any claim of *willful* conduct. *See Cheek v. United States*, 498 U.S. at 202 (in order to show a willful violation of a statute, the prosecution must negate a defendant's claim that "he had a good-faith belief that he was not violating any of the provisions of the ... laws."); *United States v. Murdock*, 290 U.S. at 396 (defendant entitled to jury charge "with respect to his good faith and actual belief").

The Court of Appeals decision in affirming the trial court's jury instructions, and in effect holding such instructions to be correct and free from error, conflict with this Court's repeated determinations that, for a person to be shown to have acted *willfully*, his accuser must do more than merely show that the accused acted. The accuser must prove that the accused acted with an intent to violate the law and with no excuse (accident, mistake, error, good-faith belief) for taking such action.

Conflict With Other Court of Appeals and Other Courts

In addition to the errors occurring in the trial court's jury instructions, and the Court of Appeals' affirmance of such instructions, regarding the *willfully* requirement of the statute, errors also occurred regarding the trial court's definition of "false pretenses" and instruction regarding the requirements of the FCRA. Such errors are in conflict with the decision of other Courts of Appeal.

The jury in this case was instructed that "false pretenses" means not only that the reasons given for requesting the consumer report are untrue, but alternatively that "the true reason for seeking consumer information was not for a purpose permitted under the Act." Prestonwood objected to such definition and instruction because it is in conflict with the provisions of the FCRA itself and because such instruction is contrary to previous interpretations provided by other courts.

It is Prestonwood's contention that "false" must actually means *false*; i.e., a lie enabling the user to obtain consumer information that the user is not entitled to

receive. Such is the holding of the Eighth Circuit in *Matthews v. Worthen Bank & Trust Co.*, 741 F.2d 217, 219 (8th Cir. 1984), where the Court of Appeals determined that when a user has a permissible purpose to obtain a consumer report, then the user cannot obtain the report under *false pretenses*. The Sixth Circuit has recently made a similar determination that "Section 1681q ... applies only to someone who lies about having a permissible reason." *Cheatham v. McCormick*, 100 F.3d 956 (6th Cir. 1996) (Table, unpublished disposition, No. 95-6558, text available in WESTLAW, 1996 WL 662887).

This reasoning has been followed by various district courts. In *Daley v. Haddonfield Lumber, Inc.*, 943 F.Supp. 464, 467 (D.N.J. 1996), the court held:

> [A] misrepresentation is non-actionable if the FCRA would permit the requesting party to receive the credit report for an albeit unstated but permissible purpose. [citations omitted]. This result derives from the fact that the requesting party's legal right to information renders immaterial any misrepresentation [she] may have committed in obtaining [the credit information] as the consumer reporting agency was authorized to disclose the report regardless."

See also Korotki v. Attorney Services Corp., 931 F.Supp. 1269, 1276 (D.Md. 1996); *Baker v. Bronx-Westchester Investigations, Inc.*, 850 F.Supp. 260, 264 (S.D.N.Y. 1994); *Zeller v. Samia*, 758 F.Supp. 775, 781-81 (D.Mass. 1991). Courts have even interpreted the statute as not being violated when the report is obtained for an impermissible purpose if that purpose is revealed in obtaining the report.

DiCarlo v. Maryland Auto. Ins. Fund, 855 F.Supp. 823, 824 (D.Md. 1994); *Allen v. Calvo*, 832 F.Supp. 301, 303 (D.Or. 1993).

The trial court also instructed the jury that a user of information, such as Prestonwood, is required under the FCRA to assure not only that its reason for obtaining consumer information if valid, but that the use made of the information obtained is an authorized purpose under the FCRA. By its summary affirmance, the Court of Appeals agreed.

However, such requirement is not provided by the terms of the FCRA itself and has not been recognized by other courts. In fact, courts have recognized just the opposite. The permissible purposes for obtaining a consumer report are provided in Section 1681b of the FCRA. However, Section 1681b only provides the reasons that a consumer reporting agency may release a report, not the uses to which a report may be used.

> Section 1681b only limits the dissemination of "consumer reports" by "consumer reporting agencies." It does not, by its plain terms, place any duty upon persons to refrain from requesting consumer reports from individuals for purposes not authorized by the FCRA.

Ippolito v. WNS, Inc., 864 F.2d 440, 448 n.8 (7th Cir. 1988). The Eighth Circuit went on to note:

> The statute does not ... appear to impose any liability upon a person merely for 'negligently causing' a consumer report to be prepared for an impermissible purpose.

Id. Even the Fifth Circuit itself has noted previously that

the FCRA imposes no very few and very limited responsibilities upon a user of information.

> Apparently, the only requirement placed upon a "user" of a credit report is the duty to disclose the name and address of the reporting agency when credit is denied. 15 U.S.C. § 1681m.

Wood v. Holiday Inns, Inc., 508 F.2d 167, 172 (5th Cir. 1975).

Similarly, the trial court's imposition of a *reasonable procedures* requirement for users such as Prestonwood has been rejected. *See Wiggins v. District Cablevision, Inc.*, 853 F.Supp. 484, 491 (D.D.C. 1994) ("Plaintiff's reliance on a reasonable procedure requirement for users of information as a basis for liability ... is clearly erroneous.")

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 11, 1997

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

FILED

No. 96-10079 OCT 11 1996

ALAN NIEDERLITZ; PEGGY NIEDERLITZ,
Plaintiffs-Appellees,

v.

PRESTONWOOD GOLF CLUB CORP., Doing Business as Prestonwood Country Club,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:94-CV-2395)

Before KING and HIGGINBOTHAM, Circuit Judges, and LAKE* , District Judge.

PER CURIAM:**

The district court entered judgment against Prestonwood Golf Club Corp., defendant-appellant,

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*District Judge of the Southern District of Texas, sitting by designation.

**Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

following a jury verdict in favor of Alan Niederlitz and Peggy Niederlitz, plaintiffs-appellees, in their suit against Prestonwood for violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.. Prestonwood appeals, arguing that the jury instructions were flawed and that the evidence was insufficient to support the jury's finding of liability under the FCRA. We are not persuaded that the charge as a whole created substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations. The district court did not err in failing to grant judgment as a matter of law for Prestonwood following the return of the verdict. The judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ALAN NIEDERLITZ AND
PEGGY NIEDERLITZ

VS. 3-94-CV-2395-AH

PRESTONWOOD GOLF CLUB CORP
d/b/a PRESTONWOOD COUNTRY
CLUB

COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

Defendant Prestonwood Golf Club Corp. d/b/a Prestonwood Country Club is a corporation. A corporation may act only through natural persons as its agents or employees and, in general, any agent or employee of a corporation may bind the corporation by

his or her actions done and statements made while acting within the scope of his or her authority as delegated to him or other by the corporation or within the scope of his or her duties as an employee of the corporation. An employee acting outside his or her delegated authority or outside the scope of his or her duties of employment may not bind the corporation. However, even though an act is forbidden it may still be within the scope of employment so as to impose liability on the corporation. In deciding whether the act complained of was within the scope of employment you should consider such facts as where the acts took place and their foreseeability.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. Also I have no opinions about the facts of this case, and you are instructed to disregard anything I may have said or done during trial which might lead you to believe otherwise.

In the final analysis, it is your own recollection and interpretation of the evidence that controls in this case. And, although you must consider all the evidence, this does not mean that you must accept all of the evidence as being true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his or her testimony. In weighing the testimony of a witness you should consider all of the circumstances

under which the witness testified: any relationship to one of the parties or any interest in the outcome of the case; the witness's manner of testifying; the witness's opportunity to observe or acquire knowledge concerning the facts about which he or she testified; the witness's candor, fairness and intelligence; and the extent to which the witness has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness, in whole or in part.

A witness may be discredited or impeached by contradictory evidence, by a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something which is inconsistent with the witness' present testimony. If you believe that any witness has been so impeached, then you are to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses is more credible than the contrary testimony of a larger number of witnesses.

Generally speaking, there are two types of evidence which a jury may consider in properly finding the truth as to the facts in this case. One is direct evidence - such as testimony of an eye witness. The

other is indirect or circumstantial evidence - the proof of a chain of circumstances which points to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requests that the jury find the facts from a preponderance of all the evidence, both direct and
circumstantial.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Intent ordinarily may not be proven directly because there is no way of discovering or scrutinizing the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made, or act done, by a person whose intent is in issue, and all other facts and circumstances which indicate his or her state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done. It is for you, the jury, to decide what facts have been established by the evidence.

In a civil action such as this, the party asserting a claim has the burden of proving every essential element of its claim by a preponderance of the evidence.

"Preponderance of the evidence" means such evidence, when considered and compared with that opposed to it, is more convincing and produces in your minds the belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If the proof should fail to establish any essential element of a Plaintiff's claim by a preponderance of the evidence, the jury should find for the Defendant as to that claim.

For the purposes of this case you are instructed that:

Plaintiffs are "consumers", TRW is a "consumer reporting agency" and Defendant is a "use of consumer reporting information". Plaintiff's Exhibit 1 constitutes a consumer credit report - in other words, "consumer reporting information".

The Fair Credit Reporting Act provides in pertinent part that it is a violation of the Act for a use of consumer reporting information to obtain information on a consumer from a consumer reporting agency under false pretenses.

The term "under false pretenses" means that the reasons given to the consumer reporting agency - in this case TRW - by the agents and employees of Defendant were untrue or that the true reason for seeking consumer information was not for a purpose permitted under the Act.

The Fair Credit Reporting Act further provides permissible purposes for a person to obtain information which include use of the information in connection with a credit transaction involving a consumer on which the information is to be furnished and involving the review of collection of an account of the consumer.

The Fair Credit Reporting Act provides in pertinent part that a violation of the Act may be willfully committed. The term "willfully" means an act or failure to do an act done voluntarily and intentionally, and with specific intent to fail to do something which the law requires to be done; that is to say, with a purpose to disobey or disregard the law.

In this case Plaintiffs claim that Defendant, acting through its agents, willfully obtained consumer reporting information on Plaintiffs from TRW under

false pretenses and that Defendant's conduct proximately caused damages to Plaintiffs.

The term "proximate cause" means that there must be a connection between the conduct of the Defendant of which Plaintiffs complain and the injuries which Plaintiffs claim to have suffered and that the injuries were a natural and probable result of Defendant's conduct. There may be more than one proximate cause of an injury.

In order to establish this claim Plaintiffs must prove each of the following essential elements by a preponderance of evidence:

1. That the Defendant's stated purpose (reviewing and considering collection of an account of the Plaintiffs) was false; and

2. Prestonwood had actual awareness of the falsity of the pretense or purpose stated to TRW for obtaining the credit report; and

3. That defendant's actions proximately caused damage to Plaintiffs, or either of them.

QUESTION NO. 1:

Did either Plaintiff prove a claim against Prestonwood for willfully obtaining the credit report in question under false pretenses?

Instruction: Answer "Yes" or "No" as to each Plaintiff.

ANSWER:

Plaintiff Alan Niederlitz	YES
Plaintiff Peggy Niederlitz	YES

The Fair Credit Reporting Act further provides a cause of action against a user of consumer reporting information which is negligent in failing to comply with other portions of the Act, including the requirement that consumer reporting information be obtained only for purposes authorized under the Act such as for review or collection of an account of a consumer.

The term, "negligence" as used in these instructions means the failure to do something which a reasonably prudent person would do, or the doing of something which a reasonably prudent person would not do under the circumstances which you find existed in this case. It is for you to decide what a reasonably prudent person would do or not do under the circumstances.

Under the Fair Credit Reporting Act, a user of consumer reporting information must follow reasonable procedures to assure that both the reasons for obtaining such information and uses made of such information comply with the authorized purposes of the Act. The

law is directed at the actual procedure, method or steps followed by a corporation, its employees or agents in obtaining and using consumer reporting information.

In order to prove a negligent failure to comply with the requirements of the Fair Credit Reporting Act, Plaintiff must prove each of the following elements by a preponderance of the evidence:

1. That Defendant failed to adopt a procedure that would cause the existence of an allowable reason, such as review or collection of an existing account with a consumer, for the obtaining of credit information to be confirmed prior to an actual request and obtaining of said information, and

2. That such omission to act was negligence; and

3. That such negligence proximately caused actual damage to Plaintiffs, or either of them.

QUESTION NO. 2:

Did either Plaintiff prove a claim against Prestonwood for negligent failure to adopt procedures to verify the existence of a lawful purpose for requesting a credit report?

Instruction: Answer "Yes" or "No" as to each Plaintiff.

ANSWER:

Plaintiff Alan Niederlitz YES

Plaintiff Peggy Niederlitz YES

If you have answered "yes" to either Question 1 or Question 2 as to either Plaintiff, you will next consider the issue of damages as it relates to either Plaintiff, or both, as to whom your answer was "yes". If you have answered "no" to both Question 1 and Question 2 as it relates to both Plaintiffs, you should go to the end of this charge and have your foreperson sign it.

It is your duty to determine the amount of money which reasonably, fairly and adequately compensates a Plaintiff for damages proximately caused by Defendant's conduct or omissions.

You should include each element of damage which you find a Plaintiff has suffered including both past damages and any damages which a Plaintiff is reasonably certain to sustain in the future. You may include any of the following elements of damage, which you find from the evidence:

Out-of-pocket expenses, mental anguish, embarrassment and/or humiliation.

The amount of money to be awarded to a

Plaintiff for certain of these elements, such as mental anguish, cannot be proved in a precise dollar amount. The law leaves such amounts to your sound discretion.

QUESTION NO. 3:

What amount of money has Plaintiff proved, if now paid in cash, would fairly and reasonably compensate him/her for damages resulting from Defendant's acts or omissions.

Instruction: Answer in dollars and cents as to each Plaintiff of whom you have answered "yes" to Question 1 and/or Question 2.

ANSWER:

Plaintiff Alan Niederlitz 2,500

Plaintiff Peggy Niederlitz 2,500

If you have answered "yes" to Question 1 as to either Plaintiff, you will next consider the issue of punitive damages as it relates to each Plaintiff to whom your answer was "yes". If you have answered Question 1 "no" to both Plaintiffs, you would go to the end of this charge and have your foreperson sign it.

Punitive damages may be awarded by you in your discretion for the purpose of making an example of and punishing the defendant for the wrong done and to

serve as an example to others not to engage in such conduct.

Whether or not to make any award of punitive damages, in addition to actual damages, is a matter exclusively within your province. You should also bear in mind, not only the conditions under which, and the purpose for which, the law permits an award of punitive damages to be made, but also the requirement of the law that the amount of such punitive damages must be fixed with calm discretion and sound reason and must never be either awarded, or fixed in amount, because of any sympathy or bias, or prejudice with respect to any party to the case.

QUESTION NO 4:

What amount of money, if any, should be awarded as "punitive damages" against Defendant?

Instruction: Answer in dollars and cents as to each Plaintiff for whom you have answered "yes" to Question 1.

ANSWER:

Plaintiff Alan Niederlitz 7,500

Plaintiff Peggy Niederlitz 7,500

Your verdict must represent the considered

judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors.

Upon retiring to the jury room, you should first select your foreman or forewoman to preside over your deliberations and to speak for you herein court. If, during your deliberations, you wish to communicate with the Court, your message or question must be written and signed by your foreman or forewoman. Pass the note to the bailiff, who will bring it to me. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, that any note you might send must never reveal your answers to the issues on your numerical division at that time.

Remember at all times you are not partisans. You are judges - judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

/s/
United States Magistrate Judge
Wm. F. Sanderson, Jr.

VERDICT OF THE JURY

We, the jury, have answered the foregoing special issues in the manner indicated in this verdict form, and return these answers into Court as our verdict.

/s/
Foreman or Forewoman

Date: Nov. 14, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ALAN NIEDERLITZ	)	
AND	)	
PEGGY NIEDERLITZ	)	
	)	
VS.	)	3-94-CV-2395-AH
	)	
PRESTONWOOD GOLF	)	
CLUB CORP.	)	
d/b/a PRESTONWOOD	)	
COUNTRY CLUB	)	

JUDGMENT

Pursuant to the jury's verdict returned and filed in this action on November 14, 1995, and the court's order filed on this date,

It is ORDERED, ADJUDGED AND DECREED that Plaintiff Alan Niederlitz recover the sum of $77,500.00 as compensatory and punitive damages from Defendant and that Plaintiff Peggy Niederlitz recover the sum of $77,500.00 as compensatory and punitive damages from Defendant.

It is further ORDERED, ADJUDGED AND DECREED that Plaintiffs Alan Niederlitz and Peggy Niederlitz recover the sum of $13,702.50 in attorney's fees plus court costs from Defendant.

IT IS FURTHER ORDERED that the post-judgment interest on the damages and attorney's fees

awarded will accrue at the rate of 5.45% per annum until paid.

A copy of this judgment shall be transmitted to counsel for the parties.

ENTERED this 7th day of December, 1995.

/s/Wm. F. Sanderson, Jr.
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

FILED

No. 96-10079 NOV 13, 1996

ALAN NIEDERLITZ; PEGGY NIEDERLITZ,
Plaintiffs-Appellees,

v.

PRESTONWOOD GOLF CLUB CORP., doing business as Prestonwood Country Club,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

Before KING, HIGGINBOTHAM, Circuit Judges, and LAKE* , District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/

CAROLYN DINEEN KING
UNITED STATES CIRCUIT JUDGE

*District Judge of the Southern District of Texas, sitting by designation.